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NO. .....

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

JACK OSBORN WATSON,
JEFFREY CRAIG EVENSON
and
DALE STANLEY BROWNING,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the nighttime stop and boarding of the petitioner's vessel on the high seas by the United States Coast Guard, without any suspicion of non-compliance with document and safety regulations or any founded suspicion that criminal activity was afoot, violate the Fourth Amendment protection against unreasonable searches and seizures?

2. What effect should the fact that the Coast Guard used its document and safety inspection authority as a pretext or subterfuge to search for marijuana and other contraband have on the Fourth Amendment determination?

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TABLE OF AUTHORITIES CITED

Text (cont'd) **Page**

U. S. Coast Guard, U. S. Dept. of Transp.
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ON WRIT OF CERTIORARI TO THE
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PETITION FOR WRIT OF CERTIORARI

This is a petition for JACK OSBORN WATSON, JEFFREY CRAIG EVENSON and DALE STANLEY BROWNING for a Writ of Certiorari to review the Order made by the United States Court of Appeals for the Ninth Circuit on June 2, 1982, reversing the decision of the District Court which had

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The parties shown above are the only parties to this proceeding.

granted petitioners' motion to suppress evidence. The United States Court of Appeals for the Ninth Circuit ruled that a Coast Guard document and safety inspection of a 40-foot sailing vessel on the high seas after dark pursuant to an administrative plan, but without even a founded suspicion of non-compliance, was reasonable and did not violate the Fourth Amendment. The Court reached this decision even though the admitted purpose of the "administrative plan" was to enable the Coast Guard to board vessels and search for controlled substances. In other words, the Court found that the stop and search of petitioner's vessel was reasonable under the Fourth Amendment despite the concession by the Government that the strategy of the Coast Guard was to use its broad authority to conduct document and safety inspections under 14 U.S.C. § 89(a) as a subterfuge and pretext to conduct searches for contraband.

OPINIONS BELOW

To the petitioners' knowledge, the Opinion in the United States Court of Appeals for the Ninth Circuit, reversing the District Court's decision, has been officially reported but has not as yet been published. (A copy of the Opinion is attached hereto as Appendix "A".)

JURISDICTION

1. On December 17, 1981, the Federal Grand Jury for the Southern District of California returned a Three-Count indictment against petitioners. Count One charged a conspiracy under Title 21, United States Code Sections 955(a) and 955(c), to possess marijuana on the high seas with intent to distribute

Count Two charged the substantive offense of possession of marijuana on the high seas with intent to distribute, in violation of Title 21, United States Code Section 955(a). Count Three charged a conspiracy under Title 21, United States Code Sections 952, 960 and 963, to import marijuana.

2. On February 24, 1981, an evidentiary hearing on the motions to suppress evidence filed by the petitioners was held before the Honorable Leland C. Nielsen, United States District Court Judge for the Southern District of California. After the taking of limited testimony, Judge Nielsen granted petitioners' motions to suppress, concluding that a Customs' safety search by the United States Coast Guard nearly a thousand miles from United States waters could not be justified under Title 14, United States Code Section 89(a). On March 16, 1981, the Government filed a Motion for Reconsideration of Order Suppressing Evidence. At a hearing held on April 6, 1981, Judge Nielsen granted reconsideration, but re-affirmed the previous Order granting the motions to suppress. The Government thereafter filed a timely Notice of Appeal.

3. On June 2, 1982, the United States Court of Appeals for the Ninth Circuit reversed the decision of the District Court. Petitioners sought further review of the Panel's Opinion from the entire Court by filing a Petition for Rehearing En Banc, but the suggestion for an en banc rehearing was rejected on August 19, 1982.

4. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. Fourth Amendment to the United States Constitution:

"The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no warrant shall issue but upon probable cause supported by oath or affirmation and particularly describing the place to be searched and the persons or things to be seized."

2. Title 14, U.S.C. § 89(a):

"(a) The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessels subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiry, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to

arrest is being, or has been committed, by any person, such person shall be arrested, or if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized."

STATEMENT OF FACTS

On December 7, 1980, at approximately 3:30 p.m., a helicopter attached to the United States Coast Guard Cutter VENTUROUS, sighted the vessel GLOBE TROTTER, a 40-foot sail boat bearing California registration CF 1201 ET, in international waters on the high seas proceeding in a west-northwesterly direction, approximately 120 miles southwest of the tip of Baja California, Mexico.[1] The sighting was reported to Commander Richard B. Chapman, Commanding Officer of the VENTUROUS, who ordered a course change

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[1]The VENTUROUS, with a Coast Guard helicopter and aviation detachment on board, left Terminal Island, California, on November 28, 1980, for a two-week law enforcement patrol. The area of patrol was approximately 100 miles west of the mouth of the gulf of California via specified weigh points and return.

to intercept the GLOBE TROTTER.[2]

The GLOBE TROTTER was sighted shortly after 6:00 p.m. Because it was dark, the VENTUROUS' "stripe-lights" were energized when it was 4,000 yards away, which illuminated the vessel's large orange stripes and Coast Guard insignia on the hull. At 6:39 p.m., the VENTUROUS radioed the GLOBE TROTTER, identified itself as the United States Coast Guard, and ordered the GLOBE TROTTER to douse sail, heave to, and stand by to receive a small boarding party. The GLOBE TROTTER's position at this time was approximately 105 miles south-southwest of Cabo San Lucas, almost 1,000 miles from United States waters.

Three persons were dispatched in the boarding vessel. Commander Chapman instructed them to make a standard Coast Guard document and safety inspection, filling out Coast Guard form 4100, which covered safety equipment, -- floatation devices, pollution control, marine toilet inspection, document inspection and the like. Commander Chapman did not instruct them to search for marijuana, nor did he have reason to suspect that any contraband was on board the GLOBE TROTTER.

The boarding party arrived at the GLOBE TROTTER

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[2]As part of a "general administrative plan," Commander Chapman was ordered to board and inspect all United States vessels less than 200 feet in length found in specific windows or corridors located at established points in the Pacific. The purpose of the plan was to "attempt to interdict vessels of American registry which were involved in drug trafficking which vessels carry controlled substances destined for the United States." During the patrol five vessels besides the GLOBE TROTTER were boarded.

at approximately 7:02 p.m. The crewmen identified themselves to the three occupants of the GLOBE TROTTER, petitioners WATSON, EVENSON and BROWNING. and stated that they were going to make "a standard Coast Guard document and safety check." Petitioner WATSON identified himself as the owner and operator of the boat, and stated that petitioners EVENSON and BROWNING were the only other persons on board. As the boarding party entered the cabin to inspect the vessel's registration papers, one of the crewmen immediately noticed a heavy odor of marijuana. Almost simultaneously, a radio transmission from the VENTUROUS was heard ordering the boarding party to muster the crew of the GLOBE TROTTER on the fantail of the vessel, to conduct a pat-down search for weapons, and to search the vessel.

The radio transmission had been prompted by Commander Chapman's observation of 40 to 50 boxes floating in the water at positions consistent with their having come from the GLOBE TROTTER. These boxes in fact had been jettisoned from the GLOBE TROTTER in response to the Coast Guard's announcement that they intended to board and inspect the GLOBE TROTTER.

The search of the vessel led to the discovery of a cardboard box containing marijuana in the forward sail locker. This box was similar to the boxes found floating in the water. Eighteen such boxes were recovered, while the remaining sank. Each box contained roughly 24 pounds of marijuana.

REASONS WHY THE WRIT SHOULD BE GRANTED

In *Coolidge v. New Hampshire*, 403 U.S. 443, 461, 91 S. Ct.

2022, 2035 (1971), Justice Steward included within his opinion the oft-quoted statement that, "[t]he word 'automobile' is not a talisman in whose presence the Fourth Amendment fades away and disappears." In agreeing with the First, Fourth, Fifth and Eleventh Circuits that the Coast Guard has *carte blanche* authority to stop and board American vessels on the high seas to conduct document and safety inspections, the Courts have, in effect, emasculated the very constitutional principles which these famous words were based upon in relation to American citizens who step on board a United States registered vessel. Besides violating the principles recently established by this Court in *Delaware v. Prouse*, 440 U.S. 648, 99 S. Ct. 1391 (1979), followed by the Ninth Circuit in *United States v. Piner*, 608 F.2d 358 (1979), the unconscionable result reached by these Courts totally ignores the great body of Fourth Amendment law formulated by the Court in such noteworthy decisions as *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868 (1968); *Almeida-Sanchez v. United States*, 413 U.S. 266, 93 S. Ct. 2535 (1973); *United States v. Brignoni-Ponce*, 422 U.S. 873, 95 S. Ct. 2574 (1975); *United States v. Ortiz*, 422 U.S. 891, 95 S. Ct. 2581 (1975); and *United States v Martinez-Fuerte*, 428 U.S. 543, 96 S. Ct. 1374 (1976).

If the Court continues to refuse to grant certiorari to review this important issue, the Court will be condoning conduct which offends the very spirit of the Fourth Amendment. It is hard to believe that the Founding Fathers envisioned an exception to the Fourth Amendment which authorized midnight, warrantless administrative searches designed to produce evidence of a crime, but based on no suspicion of wrongdoing. However, such is the current state

of the law, in which an illegal alien has more protection on land than does an American citizen at sea. To allow this absurd situation to remain a viable concept in American jurisprudence is to make a mockery of the Fourth Amendment protections guaranteed every American citizen.

Due, therefore, to the conflict of the decisions of the various Circuits and this Court's decision in *Prouse*, which has resulted in the sanctioning of the type of conduct which is reminiscent of the practices employed by the English which helped lead to the Revolutionary War, there can thus no longer be any doubt that the granting of certiorari is absolutely necessary in order to maintain the integrity of the criminal justice system.

ARGUMENT

A. The Nighttime Stop And Boarding Of The GLOBE TROTTER, Without Any Suspicion Of Non-compliance With Document And Safety Regulations Or Any Founded Suspicion That Criminal Activity Was Afoot, Violated The Fourth Amendment Protection Against Unreasonable Searches And Seizures.

While *United States v. Piner, supra*, was pending before the Ninth Circuit Court of Appeals, this Court decided *Delaware v. Prouse, supra. Prouse* dealt with the random stop of automobiles by state police for a check of driver's license and registration. Holding that such a stop of an automobile and detention of its occupants constituted a "seizure" within the meaning of the Fourth and Fourteenth Amendments, even though the purpose of the stop was limited and the resulting

detention quite brief,[3] the Court concluded that a "standard of reasonableness" needed to be imposed "upon the exercise of discretion by government officials . . . 'to safeguard the privacy and security of individuals against arbitrary invasions . . . ' (See citations omitted.)" (440 U.S. at 453-454, 99 S. Ct. at 1396.) As to the appropriate test, the Court stated:

> " . . . [T]he permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interest against its promotion of legitimate governmental interests." (*Id.* at 654, 99 S. Ct. at 1396.)

Utilizing this test, the Court rejected *Delaware's* contention that the "state's interest in discretionary spot checks as a means of ensuring the safety of its roadways outweighs the resulting intrusion on the privacy and security of the person detained." (*Id.* at 659, 99 S. Ct. at 1399.) Noting that checkpoint stops were available as an alternative (citing *United States v. Martinez-Fuerte, supra,* and *United States v. Ortiz, supra,* the Court held:

> "Given the alternative mechanisms available, both those in use and those that might be adopted, we are unconvinced that the incremental contribution to highway safety of the

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[3]See *United States v. Martinez-Fuerte,* 428 U.S. 543, 556-558, 96 S. Ct. 3074, 3082-3083, 49 L. Ed. 2d 1116 (1976); *United States v. Brignoni-Ponce,* 422 U.S. 873, 878, 95 S. Ct. 2574, 2578, 45 L. Ed. 2d 607 (1975); *cf. Terry v. Ohio,* 392 U.S. 1, 16, 88 S. Ct. 1868, 1877, 20 L. Ed. 2d 889 (1968).

> random spot checks justifies the practice under the Fourth Amendment." (440 U.S. at 659, 99 S. Ct. at 1399.)

The *Prouse* decision no doubt allayed any doubts the Ninth Circuit may have had in holding the actions of the Coast Guard unreasonable under the Fourth Amendment.[4] As stated by the appellate court:

> " . . . [W]e note that a concept of subjective intrusion was introduced by the court in *Martinez-Fuerte* and elaborated on in *Prouse*. The Court acknowledged in those cases and in *Ortiz* that a police stop of an individual automobile may have a particularly unsettling effect upon the ordinary person. And we believe that under *Prouse* it is the weight of this subjective intrusion that must be balanced against the governmental need. If the stop of an automobile upon a public highway by an identifiable police car is felt to create such subjective intrusion as to require the use of potentially less intrusive alternatives, surely the stop of an isolated boat after dark, followed by a physical intrusion upon the boat itself, would

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[4] In *Piner*, a Coast Guard cutter was cruising the waters of San Francisco Bay on a routine patrol. At approximately 6:30 p.m., the running lights of the "Delphene," a 43-foot sailboat, were spotted and the decision to board was made. It was stipulated that the only purpose for stopping and boarding was for "a routine safety inspection," that it was done "on a random basis," and that "there were no suspicious circumstances." Once the "Delphene" was boarded and the crew advised that the boarding was for a routine safety inspection, bags of marijuana were observed through an open door. A thorough search of the boat resulted in the seizure of over two tons of marijuana.

> have an unsettling effect immeasurably greater, placing a far greater demand upon the government to come forward with balancing factors." (608 F.2d at 361.)

The Court then concluded:

> " . . . That the random stop and boarding of a vessel after dark for safety and registration inspection without cause to suspect non-compliance is not justified by a governmental need to enforce compliance with safety regulations and constitutes a violation of the Fourth Amendment." (*Id.* at 361.)

Petitioners recognize that both *Piner* and *Prouse* did acknowledge certain situations in which the practices involved in each case would have satisfied Fourth Amendment requirements. This Court stated that its holding:

> " . . . does not preclude the State of Delaware or other States from developing methods for spot checks that involve less intrusion or that do not involve the unconstrained exercise of discretion. Questioning of all on-coming traffic at roadblack-type stops is one possible alternative." (440 U.S. at 663, 99 S. Ct. at 1401; see also note 26 on same page.)

The *Piner* Court similarly held that a stop and boarding after dark would be justified if based on reasonable cause, such as an articulable suspicion of non-compliance with safety regulations, "or . . . conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer." (608 F.2d at 358.)

Seizing upon this language, the appellate court in the instant case found that *Piner* was not controlling on the grounds that: (1) the stop here did not involve an exercise of

discretion by an officer in the field, but, instead, was conducted pursuant to an "administrative plan," (2) no other feasible, less intrusive means for policing compliance with safety and documentary regulations were shown, and (3) the over-all intrusion here was less than in *Piner*, while the governmental interests were greater. It is submitted that each of the above conclusions were neither supported by the facts legitimately before the trial court or simple logic and basic common sense, and that the Court simply engaged in a number of legal fictions in order to avoid ruling on the obvious Fourth Amendment violations inherent in the actions authorized by the Coast Guard Command.

(1) The Coast Guard Plan Was Arbitrary And Discretionary.

While the appellate court was correct in concluding that the Coast Guard plan did somewhat limit the discretion of the officer in the field, the Court nevertheless ignored the arbitrary and discretionary aspects of the plan itself. While the decision as to which vessels to stop is supposedly no longer vested in the individual Commanders, the specific aspects of the plan concerning the cut-off point for the length of the vessels to be stopped and inspected, the area to be patroled for such vessels, and even the true purpose behind ordering the stops and inspections, were all arbitrary and discretionary decisions made by Coast Guard personnel. What the Coast Guard did, in reality, was, rather than leaving the decision on which vessels to stop to the officer in the field based upon objective Fourth Amendment criteria, the Guard implemented a plan where

all vessels were stopped, no matter *where*, no matter *when* and no matter *why*. Besides the suspect reason behind implementation of the plan in the first place, it is submitted that this is clearly not the type of response the *Prouse* and *Piner* Courts were looking to authorize.

In addition, each Coast Guard Commander still exercised a certain amount of discretion in enforcing the plan. Within the approximate 2-½ million square miles of the Eleventh Coast Guard District, the Commander of the VENTUROUS had to choose what specific "corridors" and "windows" to patrol in order to intercept any vessels. In the event the Commander chose a particularly heavily traveled route and sighted more than one vessel, he would then have had to choose which of the vessels to stop and inspect.

Nor did the plan contain "specific neutral criteria" which limited where the random searches could occur. (See, *e.g., Marshall v. Barlow's Inc.*, 436 U.S. 307, 313, 98 S. Ct. 1816, 1820 (1978). In fact, there really was only one criterion—where in the Eleventh District would the cutters most likely find ships laden with marijuana bound for the United States? In other words, the area to be patrolled was where the sole purpose of the mission could best be carried out.

Even the decision to search vessels only under 200 feet in length was simply one of convenience. The Guard attempted to justify this cut-off point on the ground that, generally, larger commercial vessels are already subject to inspection. Yet, many boats of less than 200 feet—those that carry for hire, people or cargo—are already inspected at regular intervals. Not all boats over 200 feet are engaged

in the merchant marine trade.

Drawing a line at 200 feet also did not mean that the Guard had the capability or intention of conducting safety and document inspections of *all* vessels under 200 feet. It still remained a random and arbitrary determination by the individual Commanders as to what vessel would be boarded. It was as if the Department of Labor had responded to the Court's decision in *Marshall v. Barlow's Inc., supra*, which required a warrant for OSHA inspections, by "limiting" OSHA inspectors to warrantless inspections of small, medium or fairly large businesses, and even certain large businesses that fit some kind of nefarious "profile." In reality, the line drawn by the Coast Guard in its plan was to give the Commanders the wides possible latitude to stop, board and search those vessels believed to be most likely to be carrying multi-ton quantities of marijuana. Any other interpretation of the "administrative plan" or the intention of the Coast Guard for its implementation is absolutely ridiculous.

Finally, the belief by the officer in the field that he had no discretion as to which vessels to stop certainly did not lessen the "subjective intrusion" vis-a-vis the crew. If *Prouse* is read in a common sense manner, it is clear that the random and discretionary aspects of the stops were found objectionable because such practices increased the "subjective intrusion" occasioned by the stops. The discretion, in itself, was not what was objectionable, but, rather, that there were no guidelines that attempted to minimize the "subjective intrusion" which resulted from the exercise of that discretion.

Applying such an analysis to the case at bar, the intrusiveness of the official conduct once on board is not

the issue. On the contrary, it is the boarding *itself* that constitutes the intrusion. And, the Coast Guard's plan did *nothing* to lessen such an intrusion, but, in fact, commanded it.

It is thus submitted that the "administrative plan" formulated by the Coast Guard apparently in response to the Ninth Circuit's decision in *Piner* simply did not address the concerns expressed by the Court in *Piner* or this Court in *Prouse*. The plan provided the Commanders with a standard so overbroad that it was, in fact, no standard at all.

(2) Less Intrusive Alternatives

While petitioners recognize that the efforts of the Coast Guard to enforce compliance with document and safety regulations would be more difficult without the authority to stop and board a vessel at any time, it certainly would not be impossible as the appellate court so concludes.

One such means would be harbor inspections. In *Prouse*, this Court suggested checkpoint stops as a possible alternative to the State of Delaware's plan, since the "subjective intrusion" would be lessened due to the motorist being apprised beforehand of the stop. It is submitted that a harbor can just as easily and effectively be blocked as a highway, For, in a harbor, which is, in reality, a sheltered by, access is only possible through one entrance. Harbors are, in fact, chosen for this reason as being secure from the battering of ocean storms. Most boats have their home port in such a harbor. To set up a checkpoint at the entrance to a harbor, therefore, would be a far more efficient, safe, and economical method of checking boats for safety and document

violations. By virtue of the large number of contacts that would be made, such a practice would be a far more effective means to ensure the safety of American citizens than the somewhat remote possibility of encountering a Coast Guard cutter somewhere in that four-fifths of the earth's surface which constitutes the high seas.

Annual dockside inspections, which were noted to be impracticable by the appellate court, are also a possibility. In the first place, if there is someone in the boat, and the boat is in the water, two requisites for dockside inspection, then the boat is "in use," and compliance with regulations is required. (46 U.S.C. § 1461(c).) In the second place, there is no reason why pleasure craft should not be subject to annual safety and document inspections similar to those in force in many states (*e.g.*, Pennsylvania) with respect to motor vehicles. That proper documentation is a "genuine" concern to the Coast Guard can certainly be inferred from the "administrative plan." Acquisition of proper documentation could be made dependent upon inspection. This very obvious method of ensuring that all vessels comply with the necessary regulations would be a much less wasteful use of police resources than the type of operation now in use.

Lastly, there has been no showing that the obtaining of a search warrant, based upon probable cuase, would not be an acceptable alternative. Warrants are clearly available by radio to Coast Guard personnel acting in a law enforcement capacity (Rule 41(a) and 41(c)(2), F.R. Cr.P.), and, unless this Court is prepared to rule that a different standard applies to searches and seizures on the high seas, no reason exists why the Coast Guard should not be bound

by the same standard. As stated by Judge Schwarzer, United States District Court Judge for the Northern District of California, in originally striking down the search in *Piner*:

> "The Court is not convinced that a procedure under which the Coast Guard must obtain a warrant or which otherwise circumscribes the discretion of its personnel at sea to board vessels will seriously burden or diminish the effectiveness of the regulatory system. *Marshall v. Barlow's Inc.*, 98 S. Ct. 1816. The public interest in the enforcement of boat safety regulations has not been shown to be a matter of such urgency as to justify the boarding by Coast Guard personnel at all hours and places of boats selected by them in their unrestrained discretion. The enforcement problem confronting the Coast Guard is no more serious than that confronting the Border Patrol whose roving discretionary patrol stops and searches have been held to infringe Fourth Amendment interests. (See citations omitted.)" (452 F. Supp. 1335, 1340 [N.D. Cal. 1978].)

(3) Intrusion On Privacy Interests Versus Governmental Interest In Securing Compliance With Document And Safety Regulations.

Petitioners do not quarrel with the proposition that due to the numerous functions the Coast Guard is empowered and relied upon to perform, the Guard should be granted very broad authority in its efforts to enforce and assist in the enforcement of all applicable federal laws upon the high seas and waters subject to the jurisdiction of the

United States. Specifically, in connection with its law enforcement activities, the Coast Guard is given statutory authority to board vessels and to make "searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violation of laws of the United States." (14 U.S.C. § 89(a).) This statute has been held to be constitutional, and some Courts, as previously indicated, have even held that the Fourth Amendment does not place any limits on the Guard's authority to board vessels and conduct registration or safety inspections. See, *e.g.*, *United States v. Williams*, 617 F.2d 1063 (5th Cir. 1980) (en banc); *United States v. Warren*, 578 F.2d 1058 (5th Cir. 1978) (en banc); *United States v. Hilton*, 619 F.2d 127 (1st Cir. 1980); *United States v. Miller*, 589 F.2d 1117 (1st Cir. 1978), *cert. den.*, 440 U.S. 958, 99 S. Ct. 1499 (1979); *United States v. Harper*, 617 F.2d 35 (4th Cir.), *cert. den.*, 449 U.S. 887, 101 S. Ct. 243 (1980); *United States v. Clark*, 664 F.2d 1174 (11th Cir. 1981) (*per curiam*). It is submitted that not only do these decisions, as well as the decision in the instant case, ignore what an intrusion upon Fourth Amendment interests are entailed by such vessel inspections, but that these Courts are simply incorrect, as "the Coast Guard's authority must be subject to the limitations imposed by the Fourth Amendment, because no act of Congress can authorize a violation of the Constitution." *United States v. Odneal*, 565 F.2d 598, 601 (9th Cir. 1977), *cert. den.*, 435 U.S. 952, 98 S. Ct. 1581 (1978), relying upon *Almeida-Sanchez v. United States, supra;* see also *United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir. 1980).

Within the excellent Fourth Amendment discussion

contained in the *Prouse* opinion, this Court dealt with the evil inherent in a plan which authorized the routine stopping and inspecting of any vehicle traveling on a State's highway. To such a plan, which is precisely what the plan in this case involved, the Court had the following to say:

> "The marginal contribution to roadway safety possibly resulting from a system of spot checks cannot justify subjecting *every occupant of every vehicle* on the roads to a seizure–limited in magnitude compared to other intrusions but nonetheless constitutionally cognizable–at the unbridled discretion of law enforcement officials. To insist upon neither an appropriate factual basis for suspicion directed at a particular automobile nor upon some other substantial and objective standard or rule to govern the exercise of discretion 'would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches . . . ' *Terry v. Ohio, supra,* 392 U.S. at 22, 88 S. Ct. at 1880. By hypothesis, stopping apparently safe drivers is necessary only because the danger presented by some drivers is not observable at the time of the stop. When there is not probable cause to believe that a driver is violating any one of the multitude of applicable traffic and equipment regulations–nor other articulable basis amounting to reasonable suspicion that the driver is unlicensed or his vehicle unregistered–we cannot conceive of any legitimate basis upon which a patrolman could decide that stopping a particular driver for a spot check would be more

> productive than stopping any other driver." (440 U.S. at 661, 99 S. Ct. at 1440; emphasis added and footnote omitted.)

The same concerns relating to the privacy interests of motorists which caused the *Prouse* Court to impose Fourth Amendment limitations on the stops involved in that case are also present in the instant case. Merely causing a vessel to alter its course or speed involves an interference with the individual's right of free movement and is thus closely analogous to the investigatory stops of individuals and automobiles recognized by the *Prouse* decision as constituting "seizures" of the person. Safety inspections also involve a boarding and a comprehensive search, which creates significant intrusions upon the distinct individual interest in privacy. The boarding alone provides a close view of areas of the vessel which the individual may justifiably seek to reserve as private. Furthermore, the safety search may entail a thorough examination of virtually *all* areas of the vessel. For example, it is standard procedure for the Coast Guard to compare the vessel's main beam number with the number on its registration papers, which may take the inspector into the hull of a commercial or semi-commercial craft or into the main living area of the pleasure vessel. Other areas of the vessel, including the engine room or compartment in the marine toilet, are also routinely subject to inspection.[5]

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[5]See United States Coast Guard, U. S. Dept. of Transp., Boarding Manual § III-IV, at 3 - 4 (1977); see also *United States v. Hilton*, 469 F. Supp. 94, 98, note 4 (D. Ma. 1979) (describing check of main beam number in engine room and noting that normal safety inspection includes check of engine room, in any event).

The Court should also consider the fact that vessels are oftentimes used by sailors at sea as their actual home, and that vessels should thus be accorded a much greater expectation of privacy than automobiles. As stated by the Fifth Circuit in *United States v. Cadena*, 558 F.2d 100 (1979):

> " . . . there are differences [in the use of vessels as compared with automobiles]. Save for the ever-increasing number of vacation vehicles and mobile homes, motor vehicles are not designed to be used as residences. The ship is the sailor's home. There is hardly the expectation of privacy even in the curtained limousine or the stereo-equipped van that every mariner or yachtsman expects aboard his vessel. . . . We . . . conclude that the increased measure of privacy that may be expected by those aboard a vessel mandates careful scrutiny both of the circumstances excusing the failure to secure a warrant . . . ."

While the statistics on boating safety relied upon by the appellate court were enlightening, they still did not support random, warrantless, nighttime safety inspections. While tragic, these numbers were extremely small when compared to the annual 50,000 deaths on the nation's highways. As recently observed in a 1980 Harvard Law Review article:

> "While the government surely has a legitimate interest in promoting safety at sea, the over-all importance of equipment inspection to the

> promotion of safety is limited by the fact that only a relatively small number of accidents and fatalities are caused by equipment deficiencies of the type which are presently checked for by the Coast Guard." *High on the Seas: Drug Smuggling, the Fourth Amendment and Warrantless Searches at Sea,* HARVARD LAW REVIEW, Vol. 93, pp. 725, 741-742 (1980).

Nor can it seriously be argued that "pleasure boating" is the type of commercial enterprise that has been so pervasively regulated as to fall within the administrative search exception. See *United States v. Biswell,* 406 U.S. 311, 92 S. Ct. 1593 (1972) [federal regulation of firearms] *Colonnade Catering Corp. v. United States,* 397 U.S. 72, 90 S. Ct. 774 (1970) [federal regulation of liquor]. In *Marshall v. Barlow's Inc., supra,* the Supreme Court clarified this administrative search exception. The distinguishing element giving rise to the exception in pervasively regulated *Biswell* businesses or traditionally regulated *Colonnade* industries, said the Court, is the awareness and expectation by a person entering such a business that he is subjecting himself to Government supervision and regulation. Under these conditions, no reasonable expectation of privacy can exist for the proprietor of the enterprise. As had been previously stated by this Court in *Almeida-Sanchez v. United States, supra:*

> "Citizens engaged in such federally licensed and regulated enterprises [must] accept the burdens as well as the benefits of their trade . . . . The businessman in a regulated industry in effect

consents to the restrictions placed upon him." (413 U.S. at 271, 93 S. Ct. at 2538.)

In the recent Supreme Court decision of *Donovan v. Dewey*, ... U.S. ..... (June 17, 1981), Justice Marshal, writing for the majority, reaffirmed the principle that legislative schemes authorizing warrantless administrative searches of commercial property do not necessarily violate the Fourth Amendment "when Congress has reasonably determined that warrantless searches are necessary to further a regulatory scheme and the Federal regulatory presence is sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." Concluding that anyone involved in the mining industry could not help but be aware that he "will be subject to effective inspection," the Court upheld the warrantless inspections of mines and quarries under the Mine Safety and Health Act.

Judged against these criteria, it would be unreasonable to suggest that a person engaged in recreational activity such as "pleasure boating" would have no real expectation that his vessel might be subject to inspection, at any time and at any place, by Coast Guard personnel. Without the "relatively unique circumstances" to indicate to an individual that his activity is subject to a regulatory scheme authorizing warrantless inspections, traditional Fourth Amendment criteria should govern such regulatory inspections.

In *Klutz v. Beam*, 374 F. Supp. 1129 (W.D.N.C. 1973), a three-judge district court reached such a conclusion,

finding random safety inspections unconstitutional. Although that case involved a lake and not the high seas, it involved a statute similar to 14 U.S.C. § 89(a) in that it authorized officers to board and inspect any boat to ensure that its equipment met all statutory safety requirements. The statute made no mention of a warrant. In finding that a warrantless boarding without probable cause violated the Constitution, the Court commented at p. 1133:

> "Even without warrants, the state could reasonably establish a procedure similar to that involving motor vehicles, requiring periodic inspection of safety and sanitation features with the posting of a sticker showing compliance with such inspection at a recorded time, and the state could make it unlawful to operate a boat without such a duly issued and current sticker appropriately displayed. However, possible emergencies aside, warrantless searches against the owner's will of a boat on a landlocked lake, which can be repeated, willy-nilly, by that inspector or any other inspector who chooses to board the boat, is an oppressive and unreasonable–and unconstitutional–burden not justified by the consideration of sanitation and safety advanced by the state."

In the recent case of *United States v. Streifel*, 665 F.2d 414 (1981), the Second Circuit, while approving the Coast Guard's warrantless boarding of a foreign vessel 200 miles off the New England coast, held that there was "no compelling reason to fashion a different set of principles for treatment of searches and seizures on the high seas than

have been developed by *Terry* and its progeny." (*Id.* at 423.) The Court thus concluded that any land-sea difference in governmental need or in intrusiveness effects only how Fourth Amendment principles are applied, not their applicability.

In summary, it is contended that the standard of articulable and reasonable suspicion applied by this Court in *Terry v. Ohio, supra; Almeida-Sanchez v. United States, supra; United States v. Brignoni-Ponce, supra; United States v. Ortiz, supra; United States v. Martinez-Fuerte, supra;* and *Delaware v. Prouse, supra,* is the appropriate standard to judge the constitutionality of the Coast Guard's plan to board *all* United States vessels whenever and wherever encountered on the high seas. The stop in the instant case–involving the hailing of a vessel at sea, during the nighttime, by a roving patrol, and then a boarding of that vessel, after which the vessel's occupants were ordered to stand aside while an indiscriminate search of any area of the vessel is conducted–certainly created a greater objective *and* subjective intrusion than involved in a roving patrol stop of an automobile. While certain steps were taken to minimize the concerns or fright the crew of the GLOBE TROTTER might have had, such precautions, in the balancing equation, still did not outweigh the constitutional right to be free from governmental interference in the absence of specific and articulable facts justifying the particular intrusion.

Based upon a "reasonable" interpretation of the protections afforded United States citizens under the Fourth Amendment, therefore, it is respectfully submitted that the actions of the Coast Guard, committed pursuant

to the "administrative plan," should have been struck down as grossly violative of the Fourth Amendment.

B. The Use By The Coast Guard Of Its Document And Safety Inspection Authority As A Pretext To Search For Marijuana And Other Contraband Required A Finding That The Stop and Boarding Of The GLOBE TROTTER Was Illegal.

In the court below, the Government stipulated that if called and sworn as a witness, Commander Chapman would have testified that,

> " My written orders, instructed me to proceed south to an area approximately 100 miles west of the mouth of the Gulf of California via specified way points and return. During the patrol, as part of a general administrative plan, I was to board and inspect all United States vessels less than 200 feet in length by patrolling specific windows or corridors located at established points in the Pacific. I was thereby to attempt to interdict vessels of American registry which were involved in drug trafficking which vessels carried controlled substances destined for the United States."

Indeed, the Government conceded in its Opening Brief that "one of the purposes of the administrative plan was to attempt to interdict the flow of marijuana into [the United States]." The appellate court implied from this concession that the corridors and windows of the VENTUROUS' patrol were chosen because they were

areas of suspected drug trafficking.[6]

Even with this recognition of the true and only purpose behind the implementation of the "administrative plan," the appellate court still refused to consider any criminal enforcement interest the Coast Guard may have

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[6]An indication of what practices are used in the Coast Guard can be found in the Boston Globe, September 17, 1978 (Parade Magazine), at p. 7:

7:

> "If we suspect a ship of carrying narcotics and it doesn't stop . . . [w]arning shots usually stop them. Then we board, usually with five men in a smaller boat, well armed. We say we are operating under the law . . . It is a subterfuge. We say we are running a check for 'compliance with U. S. law.' Or we say: 'We are authorized under umpty umpty umpt of the government something,' and we board.
>
> "If it is empty, we do a *routine* safety inspection . . . ."

(Statement of Commander John Streeper, U.S.C.G., Head of General Law Enforcement Section.) See also *Drug Smuggling (San Juan, P.R.): Hearings Before the Subcomm. on Coast Guard and Navigation of the House Comm. on Merchant Marine and Fisheries*, 94th Cong., 1st Sess. 13 (1975):

> "By the placement of a Customs Patrol Officer on board a Coast Guard vessel, thus utilizing the Coast Guard authority to hail American vessels . . . for the purpose of performing safety and documentation checks . . ., the first waive of the attack is launched . . . . The Coast Guard provides the entree and the Customs officer provides the expertise and experience in concealment techniques, drug identification and interdiction."

(Statement of Albert Bazemore, Regional Comm'r. of Customs, at 23 - 24.)

had, relying instead on the "independent administration justification" for the plan. If the words "document and safety inspection" had been mentioned anywhere in the orders received by Commander Chapman, then counsel might have been able to understand how the appellate court concluded that there was an administrative purpose behind the plan. Such, though, was not the case. The only common sense conclusion that could have been drawn from the stipulation and other facts was that the Coast Guard, pursuant to its authority to conduct document and safety inspections, was authorizing its Commanders to board United States flagged vessels for the *exclusive* purpose of looking around in the hope of finding contraband. Any other interpretation of the Coast Guard's intention would be ludicrous.

This Court has previously recognized in a number of cases that where a search or seizure is conducted with the purpose of discovering evidence that may be used in a criminal prosecution, the reasonableness of the seizure is judged by standards applicable to criminal investigations, that is, probable cause.[7] In *Michigan v. Tyler*, 436 U.S. 499, 98 S. Ct. 1942 (1978), a case that involved several entries into a premises made during, immediately after, and sometime after a fire, the Court held the initial entries valid under the administrative inspection standard. A later entry,

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[7] As the alleged administrative inspection conducted in the instant case was just a pretext for discovering evidence that could be used in a criminal prosecution, the Fourth Amendment's probable cause standard was the appropriate standard by which to judge the conduct of the Coast Guard.

however, made for the purpose of investigating a possible crime (arson) was held invalid. In so holding, the Court adopted the language of the Michigan Supreme Court and stated:

> " 'Where the cause [of the fire] is undetermined, and the purpose of the investigation is to determine the cause and to prevent such fires from occurring or recurring, a . . . search may be conducted pursuant to a warrant issued in accordance with reasonable legislative or administrative standards or, absent their promulgation, judicially prescribed standards; if evidence of wrongdoing is discovered, it may, of course, be used to establish probable cause for the issuance of a criminal investigative search warrant or in prosecution.' But, *if the authorities are seeking evidence to be used in a criminal prosecution, the usual standard [of probable cause] will apply.*' 399 Mich., at 584, 250 N.W.2d, at 477." (436 U.S. at 508, 98 S. Ct. at 1949; emphasis added.)

Again, in *Camara v. Municipal Court*, 387 U.S. 523, 87 S. Ct. 1727 (1967), the Court pointed out that:

> "[I]n a criminal investigation, the police may undertake to recover specific stolen or contraband goods. But that public interest would hardly justify a sweeping search of an entire city in the hope that these goods might be found. Consequently, a search for these goods, even with a warrant, is 'reasonable' only when there is 'probable cause' to believe they will be uncovered in a particular [place]." (387 U.S. at 535, 87 S. Ct. at

1734.)

Finally, as Justice Blackmun stated in his concurring opinion in *Delaware v. Prouse, supra:*

> "[A] random license check on a motorist operating a vehicle on highways owned and maintained by the State is quite different from a random stop to uncover violations of laws that have nothing to do [with license violations]." (440 U.S. at 664, 99 S. Ct. at 1401.)

Thus, where an administrative seizure or search is made with the objective of uncovering evidence to be used in a criminal prosecution, standards governing administrative seizures and searches will not be enough. The Government will have to justify the intrusion based on traditional concepts of probable cause. As stated by the Court in *Abel v. United States,* 362 U.S. 217, 80 S. Ct. 683 (1960):

> "We emphasize again that our view of the matter would be totally different had the evidence established, or where the courts below were not justified in finding, that the administrative warrant was here employed as an instrument of criminal law enforcement to circumvent the latter's legal restrictions, rather than as a bona fide preliminary step in a deportation proceeding. The test is whether the decision to proceed administratively toward deportation was influenced by, and was carried out for, a purpose of amassing evidence in the prosecution for crime." (362 U.S. at 230, 80 S. Ct. at 692.)

The various Circuit Courts of Appeals have also discussed this issue. In *United States v. Davis*, 482 F.2d 983 (1973), the Ninth Circuit ruled on the constitutionality of airport searches of deporting passengers in the wake of a rash of airline hijackings. Upholding the search because of "the essentially administrative nature of the screening process," the Court warned that:

> "There is an obvious danger, nonetheless, that the screening of passengers and their carry-on luggage for weapons and explosive *will be subverted into a general search for evidence of crime.* If this occurs, the courts will exclude the evidence obtained." (*Id.* at 909, footnote omitted; emphasis added.)

In *Taglavore v. United States*, 291 F.2d 626 (1961), the Ninth Circuit strongly condemned the practice of using a valid arrest for a traffic misdemeanor as a pretext or subterfuge to search for marijuana. In language that addressed the formidable taks of the Coast Guard today, the Court stated that "in no field of law enforcement and detection is the work of the law officers more difficult [than in narcotics cases]; yet, difficult as detection may be, the arm of the law extends constitutional safeguards which must be respected." (*Id.* at 264.) The facts of *Taglavore* were that an inspector of police thought the defendant was carrying marijuana on his person. He ordered two of his officers to arrest Taglavore on a warrant for two traffic violations. The inspector specifically advised the officers to be alert for marijuana. The arrest was admittedly valid. Nevertheless, the Court struck down the search, stating:

> "Where the arrest is only a sham or a front being

> used as an excuse for making a search, the arrest itself and the ensuing search are illegal . . . . Were the use of misdemeanor arrest warrants as a pretext for searching people suspected of felonies to be permitted, a mockery could be made of the Fourth Amendment and its guarantees." (*Id.* at 266.)

In an analogous situation, pretext stops of automobiles to check licenses and registration, the Courts have not hesitated to strike down the abuse of legitimate authority. In *United States v. Carrizoza-Gaxiola*, 523 F.2d 239 (9th Cir. 1975), the Government, on appeal, sought to justify a car stop as a valid check of license and registration, when in fact the officers had stopped the car because they were suspicious of car theft based on a stolen car profile. The granting of the motion to suppress was upheld. Likewise, in *Amador-Gonzalez v. United States*, 391 F.2d 308 (5th Cir. 1968), the Court struck down a search for narcotics following a traffic arrest, stating that "[t]he arrest must not be a mere pretext for an otherwise illegitimate search." (*Id.* at 313.)

Prior to this Court's ruling in *Prouse*, numerous courts had held that if a valid stop for a license check were used as a pretext, the subsequent search violated the Fourth Amendment.[8]

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[8]See *United States v. Cupps*, 503 F.2d 277 (6th Cir. 1974); *People v. McPherson*, 550 P.2d 311, 314 (1976) [safety check permissible if "not merely a ruse or a guise to conduct searches of cars"]; *Iowa v. Cooley*, 229 N.W.2d 755 (1975); *Palmore v. United States*, 290 A. 2d 573, 582 (D.C. 1972) ["spot check is not to be used as a substitute for a search for evidence of some possible crime unrelated to possession

The Ninth Circuit decision in *United States v. Hellman*, 556 F.2d 442 (1977), also disapproved of pretext seizures in another vehicle situation. The Court held that if impounding and inventorying of a car was a pretext for "an investigatory police motive," that the warrantless search of the car was unreasonable and the evidence seized should have been suppressed. The Court noted that the Supreme Court in upholding routine car inventory searches in *South Dakota v. Opperman*, 428 U.S. 364, 96 S. Ct. 3092 (1976), had made it clear that:

> "[T]here is no suggestion whatever that his standard procedure, essentially like that followed throughout the country, was a pretext concealing an investigatory police notice. 428 U.S. at 376, 96 S. Ct. at 3100." (Footnote omitted.)[9]

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of a driver's permit"]; *People v. Harr*, 235 N.E.2d 1 (Ill. 1968) [police cannot use license check "as a mere subterfuge to obtain information or evidence not related to the licensing requirement"]; *Nebraska v. Holmberg*, 231 N.W.2d 672, 678 ["We hasten to state, specifically and emphatically, that a spot check is not to be used as a pretext to search for evidence of some [unrelated] crime"]; *Morgan v. Town of Heidelberg*, 150 So. 2d 512, 515 (Miss. 1963) ["When the officer's primary purpose in stopping the motorist is not to inspect his license, but to examine the contents of the vehicle, the detention is . . . a mere subterfuge . . . for a failure to procure a warrant"].

[9]See *State v. Gwinn*, 301 A.2d 291 (Del. 1973) [automobile inventory is permissible if "not under pretext to gather evidence without a warrant"]; *Gonzalez v. Oklahoma*, 507 P.2d 1277 (1973) [where police inventory is a subterfuge, based on suspicion that contraband might be stored in the vehicle, the discovery of such contraband is inadmissible and the police inventory void *ab initio*].

While certain Courts, that have dealt with this issue in the very same factual setting as that in the instant case, have rejected the pretext claim, those cases did not involve allegations of a distric-wide plan to use safety searches to look for marijuana. In other words, there was not evidence to the effect that the primary, motivating force behind the stop and boarding was to search for drugs.

In a memorandum to Admiral Parker, then head of the Eleventh District, Commander James Meade, legal counsel for the District and a 24-year veteran of the Coast Guard, wrote about options in light of the Ninth Circuit's ruling in *Piner*. Commander Meade wrote that:

> "[I]n recent years, the Coast Guard has become involved in the enforcement of criminal law, as opposed to regulatory/safety law. If we are honest, we would probably admit that as many boardings are conducted to look for drugs as for PFDs, i.e., we are now really into 'searches' as opposed to 'inspections.'"

When Commander Meade revealed the modus operandi of the Coast Guard, he obviously never believed his warnings would be revealed. But, a more apt statement of the current practices of the Guard could not be written.

One of the principles that is unique to our constitutional system is that "fairness" to the defendant should be of overriding concern in the execution of law enforcement. Principles such as the "exclusionary rule" and "entrapment" indicate that even the "guilt" of a defendant does not outweigh the mandate for law enforcement to maintain propriety. That the "ends do not justify the means" is really a truism in the criminal area. Thus, to permit the type of blatant misuse

of authority that the Coast Guard has been engaging in is to sanction hypocrisy and deceit in American Jurisprudence.

CONCLUSION

For the above-mentioned reasons, petitioners JACK OSBORN WATSON, JEFFREY CRAIG EVENSON and DALE STANLEY BROWNING respectfully request that this Honorable Court grant the instant Petition for Writ of Certiorari.

Respectfully submitted,

MICHAEL PANCER
Attorney for Petitioner Watson

FRANK RAGEN
Attorney for Petitioner Evenson

GERSHON D. GREENBLATT
Attorney for Petitioner Browning

Annexed:

"A" Opinion of the Court Below - filed June 2, 1982

"B" Denial of Petition for Rehearing En Banc - filed August 19, 1982.

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APPENDIX "A"

OPINION OF THE COURT BELOW

In the United States Court of Appeals for the Ninth Circuit.

CA No. 81-1306

DC No. CR 80-889 - 1/2/3

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. JACK OSBORN WATSON, JEFFREY CRAIG EVENSON, and DALE STANLEY BROWNING, Defendants–Appellees.

[FILED JUNE 2, 1982]

Appeal from the District Court for the Southern District of California, Leland C. Nielsen, District Judge, Presiding.

Argued and submitted January 7, 1982

Before: CHOY, GOODWIN and FARRIS, Circuit Judges.

FARRIS, CIRCUIT JUDGE:

We consider whether a Coast Guard document and safety inspection of a 40-foot sailing vessel on the high seas after dark violated the Fourth Amendment. The stop and search was made without a founded suspicion that any maritime laws relating to safety or documentation were being violated. Citing our decision in *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979), the district court granted defendants' motion to suppress evidence seized as a result of the stop. We reverse.

FACTS[1]

The search and seizure occurred during a two week law enforcement patrol of the Coast Guard Cutter VENTUROUS. Commander Chapman was ordered to proceed south from Terminal Island, California, to an area approximately 100 miles west of the mouth of the Gulf of California via specified way points and return. During the patrol, as part of a general administrative plan, Commander Chapman was to board and inspect all United States vessels less than 200 feet in length found in specific windows or corridors located at established points in the Pacific. The vessel at issue in this case, the GLOBE TROTTER, was the third of six American vessels boarded during this law enforcement patrol.

The GLOBE TROTTER was first sighted, by a helicopter dispatched from the VENTUROUS, at 3:30 p.m., December 7, 1980, approximately 120 miles south-southwest of Cabo San Lucas on the southern tip of the Baja Peninsula. The GLOBE TROTTER radioed the helicopter crew and inquired whether they were looking for someone. Lt. Cdr. Searle asked where the GLOBE TROTTER was headed, and someone on the GLOBE TROTTER responded that they were just getting ready to turn into Cabo San Lucas. Lt. Cdr. Searle reported this information to Commander Chapman aboard the VENTUROUS.

Commander Chapman ordered a course change to intercept. Visual contact was made shortly after 6:00 p.m. It was dark, so when still 4,000 yards away, Commander Chapman ordered the VENTUROUS' stripe-lights energized.[2] Radio contact was made at 6:39 p.m. The VENTUROUS identified itself, and ordered the GLOBE TROTTER to douse sail, heave to, and

stand by to receive a small boarding party. The VENTUROUS and GLOBE TROTTER at this time were approximately 105 miles south-southwest of Cabo San Lucas, almost 1,000 miles from United States waters.

Commander Chapman dispatched three persons in the boarding vessel. He instructed them to make a standard Coast Guard document and safety inspection, filling out Coast Guard form 4100, which covers safety equipment, floatation devices, pollution control, marine toilet inspection, document inspection, and the like. Commander Chapman did not instruct them to search for marijuana, nor did he have reason to suspect that any contraband was on board the GLOBE TROTTER. He did not take certain precautions normally taken when contraband is suspected, such as sending a larger boarding party, ordering the crew of the suspected vessel on deck, and training the VENTUROUS' 50 caliber machine gun on the suspected vessel.

The boarding party arrived at the GLOBE TROTTER at approximately 7:02. They identified themselves, and stated that they were going to make "a standard Coast Guard document and safety check." Defendant Watson identified himself as the owner and operator of the boat. Defendants Evenson and Browning were the only other persons on board. As the boarding party entered the cabin to inspect the vessel's registration papers, one of them immediately noticed a heavy odor of marijuana. He then almost immediately heard a radio transmission from the VENTUROUS ordering the boarding party to muster the GLOBE TROTTER crew on the fantail of the vessel, to pat them down and place them under armed guard, and to search the vessel.

The radio transmission had been prompted by Commander

Chapman's observation of 40 to 50 boxes floating in the water at positions consistent with their having come from the GLOBE TROTTER. These boxes in fact had been jettisoned from the GLOBE TROTTER in response to the Coast Guard's announcement that they intended to board and inspect the GLOBE TROTTER.

The search of the vessel led to the discovery of a cardboard box containing marijuana in the forward sail locker. This box was similar to the boxes found floating in the water, eighteen of which were recovered while the rest sank. Each box contained roughly 24 pounds of marijuana.

All three defendants subsequently were charged with conspiracy to possess marijuana on the high seas with the intent to distribute, in violation of 21 U.S.C. §§ 955(a) & (c), and conspiracy to import marijuana, in violation of 21 U.S.C. § 963. The defendants moved to suppress evidence obtained as a result of the stop and search. The motion to suppress was granted, and the government appeals.

ANALYSIS

I. *PINER*

Defendants argue, and the district court assumed, that our decision in *United States v. Piner*, 608 F.2d 358 (9th Cir. 1979), controls and requires suppression of the evidence seized from the GLOBE TROTTER. We disagree.

Piner involved a random stop of a 43-foot sailboat during a routine Coast Guard patrol of San Francisco Bay. As here, the commander acted without a warrant and without

probable cause to believe or a founded suspicion that a violation of the law had occurred. Also as in this case, the stop occurred after dark, at approximately 6:30 p.m. But unlike this case, the decision to board in *Piner* was made solely by the commander on board the Coast Guard cutter, was not pursuant to an administrative plan, and was for the sole purpose of inspecting for compliance with safety regulations. The sailboat was hailed, the Coast Guard cutter identified itself, and the sailboat was ordered to prepare to be boarded. Once on board, one member of the boarding party immediately noticed through an open door bags of marijuana in plain view in a lighted cabin below.

We concluded that the search and seizure in *Piner* constituted a violation of the Fourth Amendment.

> "If the purpose of the random stop is to ascertain and discourage noncompliance with safety regulations, we see no reason why this purpose cannot sufficiently be accomplished during the daylight hours. Thus, reliance on this less intrusive means eliminates the need for stops and boardings after dark where no cause to suspect noncompliance exists.
>
> "We conclude that the random stop and boarding of a vessel after dark for safety and registration inspection without cause to suspect noncompliance is not justified by the governmental need to enforce compliance with safety regulations and constitutes a violation of the Fourth Amendment. A stop and boarding after dark must be for cause, requiring at least a reasonable and articulable suspicion of noncom-

> pliance, or must be conducted under administrative standards so drafted that the decision to search is not left to the sole discretion of the Coast Guard officer."

Id. at 361.

In deciding *Piner*, we relied heavily on the Supreme Court's then very recent decision in *Delaware v. Prouse*, 440 U.S. 648 (1979). *Prouse* involved a random stop of an automobile for a routine check of driver's license and registration. The Court held that such a random stop "at the unbridled discretion of police officers," without even a reasonable suspicion that any laws were being violated, was an unreasonable seizure under the Fourth Amendment.

At the outset, the Court in *Prouse* stated that the Fourth Amendment imposes a standard of reasonableness upon the exercise of police discretion. Reasonableness implies a balancing of the competing individual and governmental interests.

> "Thus, the permissibility of a particular law enforcement practice is judged by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests."

Id. at 654 (quoted in *Piner*, 608 F.2d at 360).

The intrusion must be measured in terms of both " '[the] objective intrusion—the stop itself, the questioning, and the visual inspection— . . . [and] the subjective intrusion—the generating of concern or even fright on the part of lawful travelers— . . . . ' " *Prouse*, 440 U.S. at 656 (quoting *United States v. Martinez-Fuerte*, 428 U.S. 543, 558 (1976)).

The governmental interests, on the other hand, must be

evaluated in light of "alternate mechanisms available, both those in use and those that might be adopted," to accomplish the legitimate government objectives. *Prouse*, 440 U.S. at 659.

Comparing the facts here with those of *Piner*, particularly in light of the analysis set forth in *Prouse*, we find that *Piner* does not help us determine whether the stop of the GLOBE TROTTER was reasonable under the Fourth Amendment. The over-all intrusion was less here than in *Piner*, and the governmental interests were greater.

On the intrusion side of the balance, the objective intrusion here was essentially the same as that in *Piner*, but the subjective intrusion was less. The Coast Guard took several specific steps to minimize concern or fright on the part of the GLOBE TROTTER crew. The stripe-lights were energized early, so that defendants would have less reason to be fearful. Radio contact was made almost a half hour before boarding.[3] The defendants could not have had any sense of being singled out arbitrarily, as would the occupants of a car plucked from a stream of traffic. Unlike the stops in *Piner* and *Prouse*, this stop was not made on a random basis at the discretion of an officer in the field; rather, Commander Chapman was acting according to an administrative plan directing him to stop all vessels less than 200 feet in length.[4]

On the other side of the balance, the governmental interests at stake were greater than the justifications offered in *Piner*. Only the "need to enforce compliance with safety regulations" was considered in *Piner*. 608 F.2d at 361. Here, the Coast Guard also had an interest in enforcing compliance with documentation laws. International law obligates the Coast Guard to police the documentation of

vessels flying the United States flag in international waters. Convention of the High Seas, Sept. 30, 1962, arts. 5 & 10, 13 U.S.T. 2312, 2315, 2316, T.I.A.S. No. 5200. Further, the alternative means cited in *Piner*, restricting administrative stops to daylight hours, is far less practical on the high seas, where efficiency dictates that Coast Guard crews work around the clock.[5] Even if it were practical, it is not clear that use of such an alternative means on the high seas would appreciably diminish the subjective intrusion felt by the crews of boarded vessels. During daylight hours a vessel still is isolated, with no basis for feeling singled out,[6] and no opportunity to feel reassured by the fact that other vessels are being subject to the same routine stop. See *Prouse*, 440 U.S at 657 (quoting *Martinez-Fuerte*). Whatever fear might normally be associated with darkness can be minimized by proper use of stripe lights and the radio, as was done here, such that on the high seas the subjective intrusion need not necessarily be significantly greater at night.

Since the intrusion was less here than in *Piner*, and the governmental interests greater, the balance struck in *Piner* does not resolve the question whether the stop of the GLOBE TROTTER was reasonable under the Fourth Amendment. We must balance anew the competing interests at stake.

II. PRETEXT ARGUMENT

Defendants argue that even if *Piner* is not controlling, we still do not have to decide whether routine document and safety inspections are permissible, because in any event this stop was illegal because it was motivated by criminal enforcement interests of the Coast Guard. Defendants base

this argument on the parties' stipulation that if called and sworn as a witness Commander Chapman would testify that,

> "My written orders instructed me to proceed south to an area approximately 100 miles west of the mouth of the Gulf of California via specified way points and return. During the patrol, as part of a general administrative plan, I was to board and inspect all United States vessels less than 200 feet in length by patrolling specific windows or corridors located at established points in the Pacific. I was thereby to attempt to interdict vessels of American registry which were involved in drug trafficking which vessels carried controlled substances destined for the United States."

The government concedes in its brief that "one of the purposes of the administrative plan was to attempt to interdict the flow of marijuana into [the United States]." The implication is that the corridors and windows of the VENTUROUS patrol were chosen because they were areas of suspected drug trafficking.

We rejected a similar argument made in a different context in *United States v. Goldfine*, 538 F.2d 815 (9th Cir. 1976). There federal investigators used an administrative warrant to search a pharmacy under investigation for suspected violations of the Controlled Substance Act, 21 U.S.C. §§ 801 *et seq.* The affidavit used to obtain the administrative search warrant satisfied the statutory definition of probable cause found in 21 U.S.C. § 880(d)(1), but fell short of the traditional standard of probable cause. Defendants argued unsuccessfully that the higher standard

of probable cause should have been applied because the audit in reality was a search for evidence of crime rather than an administrative search.

> "We reject the proposition that pharmacies as to which there is probable cause to suppose a violation are by that fact rendered exempt from administrative inspection and subject only to search for evidence of crime. The administrative need for and the public interest in inspection continue to provide justification apart from the obtaining of evidence of crime.
>
> " . . . [I]f the extent of the intrusion is to be limited to an inspection under § 800(b)(1) an administrative inspection warrant upon probable cause as defined in § 800(d)(1) is all that is required."

Id. at 819. *Goldfine* was followed in *United States v. Prendergast*, 585 F.2d 69 (3d Cir. 1978).

The First Circuit has squarely rejected defendants' argument. See *United States v. Arra*, 630 F.2d 836 (1st Cir. 1980). There the First Circuit declined to invalidate a document and safety inspection motivated by suspicion of drug smuggling.

> "Appellants point out that the Point Warde would never have intercepted the Great Mystery had the latter not first been detected by a helicopter and identified as a suspect marijuana smuggler on the basis of a list maintained by the government. We may agree that the order to stop and board the Great Mystery was not stimulated by any primary concern over

> the condition of its safety gear and bilges, but we do not think the motivation for a particular boarding in relevant where, as here, an objective basis for conducting the document and safety check existed . . . .
>
> " . . . We would see little logic in sanctioning such examinations of ordinary, unsuspect vessels but forbidding them in the case of suspected smugglers. Moreover, the difficulty of applying a subjective standard would be monumental . . . . While the instant case may be somewhat unusual in that a cutter was specially dispatched, document and safety inspections are routinely conducted by cutters on patrol, and, as is becoming apparent from the growing case law, contraband may be discovered in the course of these routine inspections. Ascertaining the real motivation or suspicions of the officer who orders any one of these numerous inspections would prove intractable. Thus, rather than looking into the minds of the officers, we will concentrate on their actions. If the search is limited in scope to checking documentation and inspecting safety equipment and conditions, it is valid."

Id. at 845-46. See *United States v. Hayes*, 653 F.2d 8, 12 (1st Cir. 1981) (quoting from *Arra*).

The Third Circuit also has declined to invalidate an otherwise properly conducted document inspection stop merely because partly motivated by suspicion of criminal behavior. See *United States v. Demanett*, 629 F.2d 862 (3d Cir. 1980), *cert. denied*, 450 U.S. 910 (1981):

> "The defendants urge that . . . the plain view fruits of the documentation verification should nevertheless be suppressed because documentation verification was a mere pretext for a criminal investigative search. Given the evidence about the EPIC check and the wireless conversations between the POINT FRANKLIN and the Cape May Coast Guard Station it is clear that Lt. Olthuis' interest in the KRISTEN JANE went beyond an inquiry as to its documentation. We assume, therefore, that the interception of that vessel had at least a dual purpose. The trial court held that if the documentation verification purpose sufficed to justify the interception the criminal investigative purpose was irrelevant. We agree, at least in cases such as this one, in which the discovery of contraband is made in the course of an inspection no more intrusive of the normally concealed parts of the vessel than was necessary for such verification. The Coast Guard has responsibility for enforcement of the penal provisions of the customs law, but it also has responsibility for enforcement of the laws requiring vessel documentation. The existence of the first responsibility in no way diminishes the second, and a documentation verification inspection was made."

Id. at 868-69. The Third Circuit reached this result even though defendants had produced evidence of specific instructions to Coast Guard personnel regarding how to conduct safety inspections in such a manner as to intrude into likely hiding places for contraband.

Support for an objective rather than a subjective test of police conduct is found in *Scott v. United States*, 436 U.S. 128 (1978). There the Court stated that "almost without exception in evaluating alleged violations of the Fourth Amendment the Court has just undertaken an *objective* assessment of an officer's actions in light of the facts and circumstances then known to him." *Id.* at 137 (emphasis added). A similar conclusion was reached in A. Amsterdam, "Perspectives on the Fourth Amendment," 58 Minn. L. Rev. 349 (1974). Discussing the problem of potential police abuse of their power to stop and frisk, Professor Amsterdam wrote:

> "The second possible curb against abuse is to inquire into the officer's motive or purpose for conducting the stop and frisk. But surely the catch is not worth the trouble of the hunt when courts set out to bag the secret motivations of policemen in this context. A subjective purpose to do something that the applicable legal rules say there is sufficient objective cause to do can be fabricated all too easily and undetectably. Motivation is, in any event, a self-generating phenomenon: if a purpose to search for heroin can legally be accomplished only when accompanied by a purpose to search for a weapon, knowledgeable officers will seldom experience the first desire without a simultaneous onrush of the second."

Id. at 436-37.

We find the reasoning of the quoted authorities to be persuasive at least in this special context. We assume that

the administrative plan which led to the stop of the GLOBE TROTTER was motivated partly by suspicion of drug smuggling. However, the stop and search had an independent administrative justification, and did not exceed in scope what was permissible under that administrative justification. Therefore, we need not consider any criminal enforcement interest the Coast Guard may have had.

III. REASONABLENESS OF ROUTINE DOCUMENT AND SAFETY INSPECTIONS

We must decide whether a Coast Guard document and safety inspection of a 40-foot sailing vessel on the high seas after dark pursuant to an administrative plan but without even a founded suspicion of noncompliance violates the Fourth Amendment. We conclude that such routine stops are reasonable and do not violate the Fourth Amendment.

The Coast Guard's statutory authority to stop and inspect vessels in international waters is found in 14 U.S.C. § 89(a):

> "The Coast Guard may make inquiries, examinations, inspections, searches, seizures, and arrests upon the high seas and waters over which the United States has jurisdiction, for the prevention, detection, and suppression of violations of laws of the United States. For such purposes, commissioned, warrant, and petty officers may at any time go on board of any vessel subject to the jurisdiction, or to the operation of any law, of the United States, address inquiries to those on board, examine the ship's documents and

> and papers, and examine, inspect, and search the vessel and use all necessary force to compel compliance. When from such inquiries, examination, inspection, or search it appears that a breach of the laws of the United States rendering a person liable to arrest is being, or has been committed, by any person, such person shall be arrested or, if escaping to shore, shall be immediately pursued and arrested on shore, or other lawful and appropriate action shall be taken; or, if it shall appear that a breach of the laws of the United States has been committed so as to render such vessel, or the merchandise, or any part thereof, on board of, or brought into the United States by, such vessel, liable to a fine or penalty and if necessary to secure such fine or penalty, such vessel or such merchandise, or both, shall be seized.

This statute gives the Coast Guard plenary authority to stop vessels for document and safety inspections. However, like any other federal regulation, this statute is subject to constitutional limitations. "[I]f a warrant requirement is imposed by the fourth amendment, no statute can dispose of it." *United States v. Raub*, 637 F.2d 1205, 1208 (9th Cir.), *cert. denied*, 449 U.S. 922 (1980). "[T]he Coast Guard's authority must be subject to the limitations imposed by the Fourth Amendment, because no act of congress can authorize a violation of the Constitution." *United States v. Odneal*, 565 F.2d 598, 601 (9th Cir. 1977), *cert. denied*, 435 U.S. 952 (1978).

As already noted, the Fourth Amendment imposes a standard of reasonableness. This standard implies a balancing

of the competing individual and governmental interests. To determine whether the law enforcement practice at issue is permissible, we must balance the intrusion on the defendants' Fourth Amendment interests against the promotion of legitimate governmental interests. *Delaware v. Prouse*, 440 U.S. 648, 654 (1979) (quoted *supra* at p. .....). We must consider both the objective and subjective intrusion, *id.* at 656, and we must evaluate the governmental interests in light of alternative mechanisms available, *id.* at 659.

Defendants do not deny that the government has strong, legitimate interests in securing compliance with document and safety regulations. Besides the obvious public interest in safety and the government's legitimate interest in preventing improper use of the United States flag by foreign vessels, international law requires the United States to regulate the operation of its flag vessels on the high seas. See Convention of the High Seas, Sept. 30, 1962, arts. 5 & 10, 13 U.S.T. 2312, 2315, 2316, T.I.A.S. No. 5200.

Nor do defendants challenge the effectiveness of Coast Guard boardings in detecting violations of documentation and safety regulations. The hazards of safety violations and the effectiveness of Coast Guard boardings in detecting such violations are amply illustrated by *U. S. Coast Guard Boating Statistics 1979 (Commandant Instruction M 16754.1A) and U. S. Coast Guard Office of Boating, Recreational Boating Safety Program Activities Report, Date Summary for Fiscal Years 1978-1979.* The latter report indicates that deficiencies relating to equipment or documentation were noted in 31,792 out of 47,018 Coast Guard boardings conducted in 1979. The government further offered to prove (1) that safety violations were

observed in approximately 80% of vessel boardings conducted by Commander Chapman during recent patrols out of Long Beach, and (2) that in 1980 the 2,275 boardings conducted by the entire Eleventh Coast Guard District resulted in 1,171 citations, of which 368 were on the high seas. This record of effectiveness contrasts sharply with the marginal contribution to law enforcement resulting from the random stops of automobiles at issue in *Delaware v. Prouse*, 440 U.S. 648 (1979).[7]

Defendants have not shown any feasible, less intrusive means for policing compliance with safety and documentation regulations. A requirement that the Coast Guard have a founded suspicion of noncompliance before boarding would completely frustrate Coast Guard efforts to enforce compliance, simply because most documentation and safety violations cannot be detected without boarding. We have already noted the impracticality of annual dockside inspections. See *Piner*, 608 F.2d at 359-60 (9th Cir. 1979). Safety regulations apply to pleasure boats only when in use. 46 U.S.C. § 1461(c). Requiring compliance at all times would expose boat owners to considerable risk of dockside theft. Even if compliance were required at all times and the Coast Guard did conduct annual inspections, in light of the ease with which safety equipment and documentation can be removed, supplementary routine boarding checks probably still would be necessary to enforce compliance.

Roadblock-type stops obviously are not feasible on the high seas. Defendants argue that harbors can be blocked just as effectively as a highway, and that such harbor checkpoint inspections would be a more efficient, safe and effective method of enforcing safety and documentation laws.

This argument overlooks the fact that many American vessels travelling in international waters only infrequently enter American ports. "Inspection schemes limited to inspecting vessels in American ports would decrease the Coast Guard's ability to police all American flag vessels, particularly since such vessels may operate far from the shores of the United States, seldom calling on American ports." *United States v. Hilton*, 619 F.2d 127, 132 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980). Thus, even if the Coast Guard were to institute harbor checkpoint stops, additional boardings, particularly on the high seas, probably would be necessary for effective enforcement procedures. Further, a prohibition on high seas boardings would unnecessarily limit the activities of Coast Guard vessels patrolling international waters for other legitimate purposes.

The impracticality and doubtful usefulness of restricting document and safety inspections on the high seas to daylight hours already has been discussed. See n. 5 and accompanying text. At least under the facts of this case, the distinction between daylight and darkness is irrelevant.

The government interests in enforcing compliance with documentation and safety laws must be balanced against the intrusion on defendants' Fourth Amendment interests. However, the boarding in this case involved minimal objective intrusion. A heavy odor of marijuana was noticed as soon as the boarding party entered the vessel's cabin. Almost simultaneously, Commander Chapman observed 40 to 50 boxes floating in the water at positions consistent with their having been jettisoned from the GLOBE TROTTER.[8] Further, the Coast Guard had taken steps to minimize any subjective intrusion. The stop did not involve an

exercise of discretion by an officer in the field, but instead was conducted pursuant to an administrative plan. Radio contact was established more than twenty minutes before boarding, and stripe-lights were used to illuminate the Coast Guard vessel's teal and orange stripes. There is no evidence that unnecessary force, or any force, was employed to effect the stop.

We conclude that the modest Fourth Amendment interests implicated by the stop and boarding in this case are outweighed by the government's strong interest in securing compliance with document and safety regulations.[9]

As further evidence of the reasonableness of the enforcement technique at issue, the statutory grant of authority in 14 U.S.C. § 89(a) can be traced to an enactment of the First Congress, the same Congress which proposed the Fourth Amendment. Section 31 of the Revenue Service Act provided:

> "That it shall be lawful for all collectors, naval officers, surveyors, inspectors, and the officers of the revenue cutters . . . to go on board of ships or vessels in any part of the United States, or within four leagues of the coast thereof, if bound to the United States, whether in or out of their respective districts, for the purposes of demanding the manifests aforesaid, and of examining and searching the said ships or vessels; and the said officers respectively shall have free access to the cabin, and every other part of a ship or vessel . . . . "

1 Stat. 164 (1790). This original enactment is persuasive evidence that stops and searches of the sort involved here

without a warrant and without even a founded suspicion are not "unreasonable" as that word is used in the Fourth Amendment. See generally *United States v. Ramsey*, 431 U.S. 606, 616-19 (1977), and *Boyd v. United States*, 116 U.S. 616, 623 (1886) (in each case the Court relied on an enactment of the First Congress as persuasive evidence of the scope of the Fourth Amendment prohibition against *unreasonable* searches and seizures).[10]

All other circuits which have addressed this issue have reached the same conclusion that Coast Guard document and safety inspections without a warrant and without a founded suspicion of noncompliance do not violate the Fourth Amendment. See, *e.g.*, *United States v. Hilton*, 619 F.2d 127, 131 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980) ("We believe the limited intrusion represented by a document and safety inspection on the high seas, even in the absence of a warrant or suspicion of wrongdoing, is reasonable under the fourth amendment."); *United States v. Harper*, 617 F.2d 35, 39 (4th Cir.), *cert. denied*, 449 U.S. 887 (1980) ("To require some particularized suspicion concerning individual vessels in order to carry out a systematic inspection of all vessels in some area of the sea would encourage outright flaunting of the navigation, safety and administrative laws of the United States at the expense of our government's sovereign obligation under international law to police its flag ships."); *United States v. Shelnut*, 625 F.2d 59, 61 (5th Cir. 1980), *cert. denied*, 450 U.S. 983 (1981) ("A United States vessel in international waters may be boarded for the purpose of conducting such [a document and safety] inspection without any particularized suspicion of a violation of the law . . . ."

(citations omitted)); *United States v. Clark*, 664 F.2d 1174, 1175 (11th Cir. 1981) (per curiam) ("The Coast Guard has plenary power under 14 U.S.C. § 89(a) to stop and board American vessels on the high seas to inspect for safety, documentation, and obvious customs and narcotics violations. The fact that this authority is exercised without probable cause or reasonable suspicion does not violate the fourth amendment"). No circuit has reached the opposite conclusion.

The decision of the district court is REVERSED.

FOOTNOTES

[1]The parties entered into lengthy stipulations, specifying to what various people would testify if called and sworn as witnesses. We base our fact summary on this stipulated testimony.

[2]These stripe-lights illuminate the vessel's large orange stripes and Coast Guard seal.

[3]The GLOBE TROTTER's radio contact with the Coast Guard helicopter three hours earlier probably further reduced any legitimate subjective intrusion, though we note that Lt. Cdr. Searle did not actually tell the GLOBE TROTTER crew to expect further contact with the Coast Guard.

[4]Defendants argue that Commander Chapman did exercise some discretion by choosing which specific corridors and windows to patrol within his assigned area. This argument is not supported by the record. The parties did stipulate that the VENTUROUS patrolled only half of its assigned area. But the record contains no explanation of this shortfall, nor is there any indication who decided on what basis what areas would not be covered.

[5]Restricting administrative stops to daylight hours would significantly

curtail the number of stops a cutter could make during a routine patrol. Assuming the facts of this case are typical, and that a routine stop without arrests often takes four hours from the time the vessel is first sighted by helicopter, only a couple of stops a day would be possible during the winter months. The Coast Guard cannot be expected to set aside all daylight hours to only one task, at the expense of other legitimate Coast Guard functions.

[6]In this sense, being on the high seas is more like being a hunter in the woods than an automobile driver in the flow of traffic. *Prouse* is not "a precedent that throws any constitutional shadow upon the necessarily somewhat individualized and perhaps largely random examinations by game wardens in the performance of their duties." 440 U.S. at 664 (Blackman, J., joined by Powell, J., concurring).

[7]Summing up the ineffectiveness of random stops of automobiles, the Court in *Prouse* stated:

> "It seems common sense that the percentage of all drivers on the road who are driving without a license is very small and that the number of licensed drivers who will be stopped in order to find one unlicensed operator will be large indeed. The contribution to highway safety made by discretionary stops selected from among drivers generally will therefore be marginal at best.

Id. at 659-660.

[8]Any subsequent intrusion caused by the Coast Guard was supported by probable cause and is not relevant to our analysis.

[9]Our holding is limited to the facts of this case. We do not have to decide today what areas of a sailing vessel may properly be entered or examined as part of a routine document and safety check. We also do not have to decide whether we would reach the same result if Commander Chapman had been acting upon his own discretion, instead of pursuant to an administrative plan.

Compare United States v. Harper, 617 F.2d 35, 38 (4th Cir.), *cert. denied*, 449 U.S. 887 (1980) (relying in part on the fact that the boarding was pursuant to a policy of stopping all United States vessels less than 250 feet in length and "was not one made at the will and whim of the officer in the field.") *with United States v. Hilton*, 619 F.2d 127, 133 (1st Cir.), *cert. denied*, 449 U.S. 887 (1980) ("While the Coast Guard is thus left with considerable discretion in deciding which vessels to stop, we believe such discretion is virtually unavoidable in a scheme of regulation that depends on stops conducted at sea, far from courts and magistrates."). Nor do we have to decide today whether the Coast Guard can make stops without founded suspicion for purposes other than routine document and safety inspections. *Compare United States v. Freeman*, 660 F.2d 1030, 1033-34 (5th Cir. 1981) ("We have held on numerous occasions that the Coast Guard's plenary authority under § 89 'to stop and board American vessels on the high seas to inspect for safety, documentation, and obvious customs and *narcotics violations* to be reasonable within the meaning of the fourth amendment' . . . . These inspections may be conducted 'in the complete absence of suspicion of criminal activity.'" (quoting *United States v. DeWeese*, 632 F.2d 1267, 1269 (5th Cir. 1980) *and United States v. Clark*, 664 F.2d 1174, 1175 (11th Cir. 1981) (same quoted *infra* at p. .....) *with United States v. Hilton*, 619 F.2d at 131 ("Although the statutory language [of § 89(a)] is quite broad, the statute has been consistently construed as limiting such stops—in the absence of probable cause—to the necessary task of conducting safety and document inspections.").

[10] In *Ramsey* the Court said: "The historical importance of the enactment of this customs statute by the same Congress which proposed the Fourth Amendment is, we think, manifest." 431 U.S. at 616-17. Similarly, in *Boyd*, the Court stated: "as this [revenue] act was passed by the same Congress which proposed for adoption the original amendments to the Constitution, it is clear that the members of that body did not regard searches and seizures of this kind as 'unreasonable,' and they are not embraced within the prohibition of the amendment." 116 U.S. at 623.

DENIAL OF PETITION FOR REHEARING AND REJECTION OF SUGGESTION FOR REHEARING EN BANC

In the United States Court of Appeals for the Ninth Circuit.

CA No. 81-1306

DC No. CR 80-889 - 1/2/3

UNITED STATES OF AMERICA, Plaintiff-Appellant, vs. JACK OSBORN WATSON, JEFFREY CRAIG EVENSON, and DALE STANLEY BROWNING, Defendants-Appellees.

[FILED AUGUST 19, 1982]

Before: CHOY, GOODWIN and FARRIS, Circuit Judges.

The panel has voted unanimously to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for an en banc hearing and no judge of the court has requested a vote on it. Fed. R. App. p. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

PROOF OF SERVICE BY MAIL

STATE OF CALIFORNIA)
) ss.
County of Riverside)

I, the undersigned, say: I am and was at all times herein mentioned, a citizen of the State of California, County of Riverside, employed in the County of Riverside, over the age of eighteen years and not a party to the within action or proceeding; that

My business address is 1340 West Sixth Street, Corona, California 91720, that on SEPTEMBER 27, 1982, I the undersigned served the within PETITION FOR WRIT OF CERTIORARI on behalf of petitioners JACK OSBORN WATSON, JEFFREY CRAIG EVENSON and DALE STANLEY BROWNING, on the following named parties by depositing three copies thereof, enclosed in a sealed envelope with postage thereon fully prepaid, in the United States Post Office in the City of Corona, California, addressed to said parties at the addresses as follows:

SOLICITOR GENERAL OF THE UNITED STATES
U. S. Department of Justice
Washington, D. C. 20530

UNITED STATES ATTORNEY
ROGER W. HAINES, JR.
940 Front Street
San Diego, California 92189

And, further, that I served the United States Court of Appeals for the Ninth Circuit a copy thereof at:

UNITED STATES COURT OF APPEALS
For the Ninth Circuit
Post Office Box 547
San Francisco, California 94101

I declare under penalty of perjury that the foregoing is true and correct.

Executed on SEPTEMBER 27, 1982, at CORONA, CALIFORNIA.

D. A. Standefer

41 COPIES FORWARDED TO THE U. S. SUPREME COURT, U. S. SUPREME COURT BUILDING, WASHINGTON, D. C. 20543

Dean-Standefer, 1340 W. 6th St., Corona, Ca. 91720
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Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
CLERK

No. 82-555

In the Supreme Court of the United States

OCTOBER TERM, 1982

JACK OSBORN WATSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
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In the Supreme Court of the United States

OCTOBER TERM, 1982

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JACK OSBORN WATSON, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the boarding of a vessel on the high seas by the Coast Guard for the purpose of inspecting the vessel's documents violates the Fourth Amendment because the boarding was made without a reasonable suspicion of a violation of law.

On December 17, 1981, petitioners were charged in a three-count indictment returned in the Southern District of California with conspiracy to possess marijuana on the high seas with intent to distribute, in violation of 21 U.S.C. (Supp. IV) 955a(a) and (c); possession of marijuana on the high seas with intent to distribute, in violation of 21 U.S.C. (Supp. IV) 955a(a); and conspiracy to import marijuana, in violation of 21 U.S.C. (& Supp. IV) 952, and 21 U.S.C. 960 and 963. Prior to trial, they moved to suppress evidence obtained in a warrantless search by the Coast Guard of a

40-foot sailing vessel on the high seas. The district court granted the motion, but the court of appeals reversed (Pet. App. 1-21).

Petitioners contend (Pet. 9-27) that the nightime stop and boarding of their vessel by the Coast Guard without reasonable suspicion violated the Fourth Amendment. Petitioners also contend (Pet. 27-36) that the Coast Guard illegally used its authority to conduct a boarding and search for documentation and safety purposes as a pretext for a search for marijuana and other contraband. Whatever the merits of petitioners' contentions, they are not ripe for review by this Court at the present time. The court of appeals' decision places petitioners in precisely the same position they would have occupied if the district court had denied their motion to suppress. If petitioners are acquitted following a trial on the merits or if the charges are dismissed on other grounds, their contentions will be moot. If, on the other hand, petitioners are convicted and their convictions are affirmed, they will then be able to present their contentions to this Court, together with any other claims they may have, in a petition for a writ of certiorari seeking review of a final judgment against them. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[1]

We note that in *United States* v. *Villamonte-Marquez*, cert. granted, No. 81-1350 (June 7, 1982), this Court has before it the question whether the statutory authority granted Customs officers to board vessels on *inland* waters for the purpose of inspecting the vessels' documents violates the Fourth Amendment where the boarding is made without a reasonable suspicion of a violation of law. However,

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[1]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

the Fifth Circuit's holding under review in *Villamonte-Marquez* is limited to boardings in inland waters. Suspicionless boardings on the high seas have been sustained by the Fifth Circuit. E.g., *United States* v. *Williams*, 617 F. 2d 1063, 1078 (1980) (en banc). Indeed, there is no conflict among the circuits on that issue, and this Court has consistently denied petitions presenting the issue presented here. *United States* v. *Green*, 671 F. 2d 46 (1st Cir. 1982), cert. denied, No. 81-2086 (June 21, 1982); *United States* v. *Harper*, 617 F. 2d 35 (4th Cir.), cert. denied, 449 U.S. 887 (1980); *United States* v. *Warren*, 578 F. 2d 1058, 1064-1066 (5th Cir. 1978) (en banc), cert. denied, 446 U.S. 956 (1980). Accordingly, while this Court's decision in *United States* v. *Villamonte-Marquez* may have some bearing on this case, it would not be appropriate to hold this petition pending the Court's consideration of *Villamonte-Marquez*. If the decision in *Villamonte-Marquez* casts any doubt upon the correctness of the decision below, petitioners can raise that claim in the district court or in a post-conviction appeal. There is thus no reason to hold this petition and further delay the trial in this case, in which the indictment was returned in December 1980, and in which trial has thus already been delayed nearly two years.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

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